UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM E. MURAWSKI, :
Plaintiff, :
v. : No. 06 Civ. 12965 (RJH)
GEORGE PATAKI, *et al.*, :
Defendants. :
---------------------------------- x

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Memorandum in Support of Defendant IAC/InterActiveCorp's Rule 12(b)(6) Motion to Dismiss, Defendant IAC/InterActiveCorp will move this Court, the Honorable Richard J. Holwell, in Courtroom 17B at the United States Courthouse, 500 Pearl Street, New York, New York 10007, at 10:00 a.m. on January 29, 2007 or on such other date as the Court may direct, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing Plaintiff's claim against Defendant IAC/InterActiveCorp.

Dated: New York, New York
January 5, 2007

Michael A. Cheah (MC 0318)
IAC/InterActiveCorp
152 West 57th Street
New York, New York 10019
(212) 314-7457
(212) 632-9547 (Facsimile)

Counsel for Defendant
IAC/InterActiveCorp

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Michael A. Cheah (MC 0318)
IAC/InterActiveCorp
152 West 57th Street
New York, New York 10019
(212) 314-7457
(212) 632-9547 (Facsimile)

Counsel for Defendant
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UNITED STATES DISTRICT COURT
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WILLIAM E. MURAWSKI, Plaintiff, v. GEORGE PATAKI, *et al.*, Defendants.	x : : : : : : : : : x	No. 06 Civ. 12965 (RJH)

MEMORANDUM IN SUPPORT OF DEFENDANT
IAC/INTERACTIVECORP'S RULE 12(b)(6) MOTION TO DISMISS

Plaintiff alleges that Defendant IAC/InterActiveCorp's ("IAC") Internet search engine, Ask.com (1) provided links to a third party website that defamed Plaintiff; (2) failed to timely remove those links when Plaintiff complained; and, based on the foregoing (3) somehow cost Plaintiff an election in which he wasn't even a candidate. Plaintiff's own allegations establish that his claim against IAC is barred by the Communications Decency Act of 1996 (the "CDA"), 47 U.S.C. § 230, *et seq.*, which immunizes interactive computer services like Ask.com from State law claims based upon defamatory statements made by third parties. Accordingly, the Court should dismiss Plaintiff's claim against IAC with prejudice.

FACTUAL ALLEGATIONS

According to Plaintiff, Ask.com is wholly owned by IAC (Am. Compl. ¶ 7)[1] and is an Internet search engine like Yahoo.com and Google.com. (*See id.* ¶ 54; *see also* http://www.ask.com.) Ask.com allows members of the public to search its directory of third party websites. (*See* Am. Compl. ¶ 54-55 (at p. 20).) Before November 7, 2006, Plaintiff learned that searches using "Yahoo!, Ask.com[,] Google and other search engines resulted in Plaintiff's name being associated with the Communist Party." (*Id.* ¶ 54.) Plaintiff claims that this "libelous" statement "was taken directly from the information provided by the Politics1.com website" (*id.*), a third party website operated by defendant Ronald M. Gunzburger (*id.* ¶ 8).

Plaintiff requested that Ask.com remove Politics1.com from its directory. (*Id.* ¶ 54.) He claims that while "Ask.com appeared to be amenable in [sic] removing the Politiocs1.com [sic] site from its directory, it did not." (*Id.*) He also states, somewhat inconsistently, that Ask.com failed to remove the Communist Party references from its search results "in a timely manner" (*id.* ¶ 7), which suggests that Ask.com did as Plaintiff requested, but just not fast enough. Plaintiff contends that this failure "affected the outcome" of New York's 2006 gubernatorial election (*id.* ¶ 55 (at p.20)), but provides no explanation of how this is even possible given that his name wasn't on the ballot.[2] Despite this, and with certitude reminiscent of the mathematical model that predicted his electoral victory (*id.* ¶ 55 (at p. 21)), Plaintiff has calculated that his damages for not being New York's next governor are $2,000,000 (*id.* Prayer for Relief ¶ e (at p. 23)).

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1 For the purpose of this motion only, IAC agrees that it is a proper defendant. Ask.com is in fact owned by IAC's wholly-owned subsidiary, IAC Search & Media, Inc.

2 This Court has previously held that "Plaintiff's claimed right to be on the ballot is lacking in merit." (Order denying Temporary Restraining Order, entered Dec. 12, 2006.)

FEDERAL LAW BARS PLAINTIFF'S CLAIM AGAINST IAC.[3]

The CDA provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). It further provides that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(c)(3). Courts have repeatedly held that these provisions bar "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 46 n.9 (2006) (collecting cases).

Ask.com is an "interactive computer service" because it is an Internet search engine that allows members of the public to search its directory of webpages (*see* Am. Compl. ¶ 55 (at p. 20)) and is therefore an "information service . . . that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2); *see also Parker v. Google, Inc*., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) ("there is no doubt that Google qualifies as an 'interactive computer service'"). Accordingly, Ask.com cannot be held liable for the statements of a third party, *i.e.*, Politics1.com's statement that Plaintiff was a member of the Communist Party.

Nor can Ask.com be held liable for failing to keep any alleged promise to remove Politics1.com from its directory. (*Cf*. Am. Compl. ¶ 55 (at p. 20).) Deciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity. *See, e.g.*,

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3 A claim should be dismissed pursuant to Rule 12(b)(6) when a plaintiff's own allegations establish an affirmative defense. *See Nghiem v. Department of Veterans Affairs*, 451 F. Supp. 2d 599, 602-03 (S.D.N.Y. 2006) (Holwell, J.) (dismissing time-barred claim).

Zeran, 129 F.3d at 330 (AOL not liable for failing to "remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material"); *Green v. America Online, Inc.*, 318 F.3d 465, 470 (3d Cir. 2003) (AOL not liable for failing "to properly police its network for content transmitted by its users"); *Parker*, 422 F. Supp. 2d at 500 (Google.com not liable "for negligence for continuing to archive the 'RayRAQ website' after being put on notice that it contained defamatory and threatening messages"); *Barnes v. Yahoo!, Inc.*, 2005 WL 3005602, at *3-4 (D. Or. Nov. 8, 2005) (Yahoo.com not liable for "'fail[ing] to fulfil [sic] its promise to remove the unauthorized profiles'").

CONCLUSION

Plaintiff's claim against IAC is barred by the Communications Decency Act. Because any amendment would be futile given IAC's broad statutory immunity, the Court should dismiss Plaintiff's claim against IAC with prejudice.

Dated: New York, New York
January 5, 2007

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